IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SANDRA K. FRABLE,	)	
	)	Civil Action
Plaintiff	)	No. 05-CV-00402
	)	
vs.	)	
	)	
CHRISTMAS CITY HOTEL, LLC, trading as Radisson Hotel Bethlehem,	)	
	)	
Defendant	)	

* * *

APPEARANCES:
DONALD P. RUSSO, ESQUIRE
On behalf of Plaintiff

SEAN M. HART, ESQUIRE
On behalf of Defendant

* * *

O P I N I O N

JAMES KNOLL GARDNER,
United States District Judge

This matter is before the court on Defendant's Motion to Dismiss Plaintiff's Complaint, which motion was filed February 4, 2005. Plaintiff's Memorandum of Law in Opposition to Defendant's Motion to Dismiss the Complaint was filed March 4, 2005. Upon consideration of the briefs of the parties[1] and for

[1] By Order of the undersigned dated March 10, 2005 we granted defendant's request to file a reply brief in this matter. Defendant's Reply Brief was filed on March 16, 2005. By Order of the undersigned dated June 22, 2005 we directed plaintiff to file a surreply brief on the limited issue of determining the applicable statute of limitations for filing a Complaint after commencing a lawsuit by Praecipe for Writ of Summons under Pennsylvania law. On June 28, 2005 Plaintiff's Memorandum of Law in Surreply to the Defendant's Reply Memorandum was filed.

the reasons expressed below, we grant defendant's motion to dismiss in part.

Specifically, we grant defendant's motion to dismiss plaintiff's claims of discrimination under Title VII of the Civil Rights Act of 1991[2] ("Title VII") and the Age Discrimination in Employment Act[3] ("ADEA"). More specifically, we conclude that plaintiff's Title VII and ADEA claims are barred by the applicable statute of limitations. Therefore, we dismiss Counts I (ADEA) and II (Title VII) of plaintiff's Complaint.

We deny defendant's motion to dismiss plaintiff's remaining state law claims and remand plaintiff's remaining claims under the Pennsylvania Human Relations Act[4] ("PHRA") to the Court of Common Pleas of Northampton County, Pennsylvania.

Jurisdiction and Venue

This action is before the court on federal question jurisdiction. 28 U.S.C. § 1331. Venue is proper because plaintiff alleges that the facts and circumstances giving rise to her causes of action occurred in Northampton County, Pennsylvania. 28 U.S.C. §§ 118, 1391.

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[2] 42 U.S.C. §§ 2000(e) to 2000(e)-17.

[3] 29 U.S.C. §§ 621 to 634.

[4] Act of October 27, 1955, P.L. 744, No. 222, §§ 1-13, as amended, 43 P.S. §§ 951-963.

Procedural History

Plaintiff's claims in this matter arise from the termination of her employment as a manager at defendant's hotel on July 23, 2002. On December 7, 2002 plaintiff Sandra K. Frable filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") against defendant Christmas City Hotel, LLC, trading as Radisson Hotel Bethlehem, and requested that the charge be cross-filed with the Pennsylvania Human Relations Commission. On March 9, 2004 the EEOC issued a right-to-sue letter to plaintiff.

On June 4, 2004 plaintiff commenced this action by filing a Praecipe for Writ of Summons with the Prothonotary of the Court of Common Pleas of Northampton County, Pennsylvania. On December 16, 2004 plaintiff filed her Complaint in the Court of Common Pleas of Northampton County. On January 28, 2005 defendant filed its Notice of Removal pursuant to 28 U.S.C. § 1441(b). Plaintiff has not contested removal.

Standard of Review

A Rule 12(b)(6) motion to dismiss examines the sufficiency of the Complaint. Conley v. Gibson, 355 U.S. 41, 45, 78 S.Ct. 99, 102, 2 L.Ed.2d 80, 84 (1957). In determining the sufficiency of the Complaint, the court must accept all plaintiff's well-pled factual allegations as true and draw all reasonable inferences therefrom in favor of plaintiff. Graves v.

Lowery, 117 F.3d 723, 726 (3d Cir. 1997).

> [T]he Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which [she bases her] claim. To the contrary, all the Rules require is "a short and plain statement of the claim" that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.

Conley, 355 U.S. at 47, 78 S.Ct. at 103, 2 L.Ed.2d at 85. (Internal footnote omitted.)

Thus, a court should not grant a motion to dismiss unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of her claim which would entitle her to relief. Graves, 117 F.3d at 726 (citing Conley, 355 U.S. at 45-46, 78 S.Ct. at 102, 2 L.Ed.2d at 84.)

Plaintiff's Complaint

In her Complaint, plaintiff avers that she was hired in June 1999 by Greenleaf Hospitality (an apparent predecessor of defendant) as an independent contractor to work on a historic preservation application for the owners of the Radisson Hotel Bethlehem, in Bethlehem, Northampton County, Pennsylvania. Because the project was approaching successful completion, plaintiff was offered a management position at the hotel.

Plaintiff accepted an offer of full-time employment and began working as a Manager at the hotel. On March 7, 2002

plaintiff received a memorandum promoting her to the position of Front Office Manager.

On June 10, 2002 plaintiff received a memorandum from the Human Resources Director for defendant, Suzanne DiLuzio, indicating that there would be a delay in the 90-day review for her new position as Front Office manager. On the same day, plaintiff spoke with Robert Gigliotti, the hotel's General Manager, to determine if there were some problems with her performance in the new job. Mr. Gigliotti allegedly responded that there were no problems with plaintiff's job performance, but that because he was new at the hotel (having begun his employment in early May 2002), he needed more time to observe plaintiff as well as other managers at the hotel. On June 10, 2002 plaintiff also spoke to Miss DiLuzio who indicated that she was not aware of any performance issues with plaintiff.

On July 23, 2002 plaintiff was called into the General Manager's office at the hotel for a meeting with Mr. Gigliotti and Miss DiLuzio. Plaintiff was told by Mr. Gigliotti that he was not happy with the front desk operations. Plaintiff was informed that the hotel owners wanted someone with more hotel experience. Mr. Gigliotti told plaintiff that because of her poor performance, "immediate separation would take place."[5] Plaintiff inquired of both Mr. Gigliotti and Miss DiLuzio why no

[5] Complaint, paragraph 19. See Exhibit A to Defendant's Brief in Support of Its Motion to Dismiss Plaintiff's Complaint.

one had ever expressed anything to her previously about any problems. The inquiry was met with no response.

Plaintiff contends that she was replaced by a male in his thirties. Furthermore, plaintiff contends that because she is a woman in her sixties, and in the absence of any apparent reason for her termination, defendant's motivation for terminating her was to replace her with a younger male in violation of the ADEA, Title VII and the PHRA.

Discussion

In its motion to dismiss, defendant contends that plaintiff's claims under Title VII and the ADEA are barred by the statute of limitations. Specifically, defendant contends that as a prerequisite to filing suit under either Title VII or the ADEA, a plaintiff must first file a charge of discrimination with the EEOC and must receive from the EEOC a notice of the right to sue. In this case, defendant does not dispute that this occurred.

A plaintiff then has 90 days in which to commence a civil action after receipt of the notice to bring suit. See 29 U.S.C. § 626(e); 42 U.S.C. § 2000e-5(f)(1). Defendant asserts that the 90-day filing period acts as a statute of limitations. McCray v. Corry Manufacturing Company, 61 F.3d 224 (3d Cir. 1995).

In this case, the EEOC issued plaintiff a right-to-sue letter on March 9, 2004. There is a presumption under the

Federal Rules of Civil Procedure that plaintiff received the letter three days later on March 12, 2004. See Fed.R.Civ.P. 6(e). Therefore, plaintiff had until June 10, 2004 to initiate a lawsuit alleging violations of Title VII and the ADEA.

Defendant concedes that on June 4, 2004 plaintiff initiated an action in the Court of Common Pleas of Northampton County by way of a Praecipe for Writ of Summons. Defendant further concedes that, although the Writ of Summons fails to allege specific violations of either Title VII or the ADEA, its filing fell within the 90-day period for plaintiff to commence litigation. However, defendant contends that this filing (and the subsequent service of the Writ of Summons on defendant) did not end plaintiff's responsibilities in this matter.

Defendant contends that by filing and serving the Writ of Summons upon defendant, under Pennsylvania law the statute of limitations in this case was extended for an additional period of 90 days for plaintiff to file a Complaint. Defendant relies on the decisions of the Superior Court of Pennsylvania in Shackelford v. Chester County Hospital, 456 Pa.Super. 356, 690 A.2d 732 (1997) and Beck v. Minestrella, 264 Pa.Super. 609, 401 A.2d 762 (1979) for this proposition.

Defendant contends that a Complaint was not filed until December 17, 2004, over three months after the statute of

limitations had expired. Thus, defendant asserts that plaintiff's claims under Title VII and the ADEA are barred by the statute of limitations.

Plaintiff asserts that she preserved her right to sue by filing a Writ of Summons in Pennsylvania state court within the 90 days of the EEOC's issuance of a notice of right to sue and that the precise facts in this case are governed by the decision of the undersigned on a nearly identical fact pattern in Vail v. Harleysville Insurance Company, No. Civ.A. 02-2933, 2003 U.S. Dist. LEXIS 17405 (E.D.Pa. Sept. 30, 2003) (Gardner, J.).

By Order dated March 10, 2005 we granted defendant leave to file a reply brief in this matter. In its reply brief, defendant argues that the arguments for dismissal in Vail and the within matter are markedly different.

Specifically, in Vail, defendant argued that plaintiff's filing of a Writ of Summons did not toll the statute of limitations because the Writ did not put defendant on notice of plaintiff's causes of action prior to the expiration of the 90-day statute of limitations. In addition, defendant argued that Mr. Vail's action should not be salvaged by the filing of a Writ of Summons when under the Federal Rules of Civil Procedure the only way to commence suit is by the filing of a complaint.

In this case, defendant concedes that the filing of the Writ of Summons tolled the statute of limitations, but the statute of limitations was only tolled for a period of time equal to the original statute of limitations (i.e., 90 days). Defendant relies on the recent decision of the Superior Court of Pennsylvania in Devine v. Hutt, 863 A.2d 1160 (Pa.Super. 2004) for this long-standing proposition under Pennsylvania law.

In response to defendant's reply brief, by Order of the undersigned dated June 22, 2005, we requested plaintiff to file a surreply brief on the discrete issue of what the applicable statute of limitations is in this matter for filing a complaint after commencing a lawsuit by Praecipe for Writ of Summons under Pennsylvania law. On June 28, 2005 plaintiff filed a surreply.

In his surreply, plaintiff relies on what he characterizes as dicta from the Supreme Court of Pennsylvania in Witherspoon v. City of Philadelphia, which states:

> At this juncture, it becomes appropriate to reassess the wisdom of the "equivalent period" doctrine. In light of the changes in practice and in application of the rules beginning with Lamp [v. Heyman, 469 Pa. 465, 366 A.2d 882 (1976)], we fail to see any justification for the continuation of this common law doctrine in the present circumstances. The notion that an action can be "kept alive" for the same period of time as the applicable limitations period although the defendant has not been made aware of the action, is inherently inconsistent with the requirement that the plaintiff make a good faith attempt to notify the defendant of the action.

564 Pa. 388, 397, 768 A.2d 1079, 1083-1084. In addition, we note that plaintiff apparently declined to provide the court with any argument on what the appropriate statute of limitations is by essentially arguing that no such statute of limitations now exists.

For the following reasons, we agree with defendant, disagree with plaintiff and dismiss plaintiff's claims under Title VII and the ADEA as barred by the statute of limitations.

Initially, we agree with defendant that our decision in Vail does not address the discrete issue in this case because the issue was not addressed by defendant in Vail.

Specifically, in Vail, defendant simply argued that plaintiff should not be permitted to circumvent the federal requirement to file a Complaint within 90 days by filing a non-specific writ in state court. There, we concluded that both state and federal courts have concurrent jurisdiction over the federal claims asserted.[6]

Moreover, under Pennsylvania law "[a]n action may be commenced by filing with the prothonotary (1) a praecipe for a writ of summons, or (2) a complaint." Pa.R.Civ.P. 1007. "Generally, compliance with the Pennsylvania procedural rule satisfies the tolling requirement in cases removed to this

[6] See 29 U.S.C. § 626(c)(1) (ADEA); Jones v. Illinois Central Railroad Company, 859 F.Supp. 1144 (N.D.Ill. 1994) (ADA).

court." Perry v. City of Philadelphia, No. Civ.A. 99-2989, 1999 U.S. Dist. LEXIS 12915 at *4 (E.D.Pa. Aug. 17, 1999).

Thus, in Vail because plaintiff filed his Praecipe for Writ of Summons in the Court of Common Pleas of Northampton County prior to the expiration of the 90-day limitations period, we concluded this satisfied Pennsylvania Rule of Civil Procedure Rule 1007 relating to commencement of an action and plaintiff tolled the statute of limitations.

In this case, defendant concedes that the filing of and service of the Writ of Summons tolled the statute of limitations. However, defendant contends that this only extended the time for plaintiff to file a Complaint for an additional 90 days. We agree.

In the recent decision of Devine v. Hutt, supra, the Superior Court of Pennsylvania reiterated the long-standing legal doctrine that "[w]hen a plaintiff successfully tolls the applicable statute of limitations on an action by timely issuance *and delivery of a [writ of summons] for service*, the action is kept alive for a period equal to the original statute of limitations. 863 A.2d at 1167 (emphasis in original); See also Shackelford v. Chester County Hospital, 456 Pa.Super. 356, 690 A.2d 732 (1997); Beck v. Minestrella, 264 Pa.Super. 609, 401 A.2d 762 (1979).

On the other hand, plaintiff relies on the decision of the Supreme Court of Pennsylvania in Witherspoon v. City of Philadelphia. We recognize that we are normally required to follow the decisions of a state's highest court on issues of state law. However, Witherspoon is a plurality opinion overturning the "equivalent period" doctrine in which a majority holding was not reached.[7] Accordingly, we conclude that we are not bound by Witherspoon because it does not represent a majority decision on the issue presented in this case.

If the Pennsylvania Supreme Court has not addressed a precise issue, a prediction must be made taking into consideration "relevant state precedents, analogous decisions, considered dicta, scholarly works, and any other reliable data tending convincingly to show how the highest court in the state would decide the issue at hand." Nationwide Mutual Insurance Company v. Buffetta, 230 F.3d 634, 637 (3d Cir. 2000) (citation omitted.)

"The opinions of intermediate state courts are 'not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court in the state would decide otherwise.'" 230 F.3d at 637 (citing West v. American Telephone

[7] See Witherspoon, supra, Opinion by Justice Zappala, joined by Chief Justice Flaherty; Concurring Opinion of Justice Saylor, joined by Justices Castille and Nigro in which these Justices agree with the result but not the reasoning and the Dissenting Opinion of Justice Newman joined by Justice Cappy in which these Justices dissent from the reasoning and the outcome.

and Telegraph Company, 311 U.S. 223, 61 S.Ct. 179, 85 L.Ed. 139 (1940)).

In this case, defendant has cited three decisions of the Superior Court of Pennsylvania which we find persuasive on the issue presented. Moreover, we do not find the Witherspoon decision cited by plaintiff to be either mandatory or persuasive authority in support of plaintiff's position.

Accordingly, because we cannot disregard the decisions of the Superior Court unless we are persuaded that the Supreme Court of Pennsylvania would rule otherwise, and we are not so persuaded, we conclude that we are required to follow the Superior Court decisions in Devine, Shackelford and Beck. Again, these cases stand for the proposition advanced by defendant that the statute of limitations is only tolled by the filing and service of a Writ of Summons for a period of time equal to the original statute of limitations.

We conclude that because plaintiff did not file a Complaint within 90 days of filing her Praecipe for Writ of Summons on June 4, 2004, (the statute of limitations for the additional 90-day period expired September 2, 2004 and plaintiff did not file a Complaint until December 16, 2004, 105 days after the statute of limitations expired) plaintiff's claims under the ADEA and Title VII are barred. Thus, we dismiss those claims.

Plaintiffs' Remaining Claims

Pursuant to a federal court's supplemental jurisdiction, we may entertain state law claims when they are so related to federal claims within the court's original jurisdiction that they form a part of the same case or controversy. 28 U.S.C. § 1367. However, if all federal claims are dismissed before trial, the court should ordinarily dismiss any remaining state law claims as well. Fortuna's Cab Service v. City of Camden, 269 F.Supp.2d 562, 566 (D.N.J. 2003).

In this case, removal jurisdiction was based on federal-question jurisdiction pursuant to 28 U.S.C. § 1331. Having determined that all federal claims against defendant must be dismissed, the only remaining claims sound in state law. We conclude that there is no federal question jurisdiction pursuant to 28 U.S.C. § 1331. Moreover, plaintiff does not allege diversity of citizenship between herself and defendant. Thus, the court does not have jurisdiction pursuant to 28 U.S.C. § 1332.

Accordingly, we decline to exercise supplemental jurisdiction over the remaining claims. Therefore, because this matter was originally filed in the Court of Common Pleas of Northampton County, Pennsylvania, rather than dismissing plaintiff's state law claims, we remand the remaining state law claims to that court.

Furthermore, because we have dismissed plaintiff's federal claims and remanded this matter to state court, we decline to address defendant's additional arguments regarding plaintiff's state law PHRA claims.

Conclusion

For all the foregoing reasons, we grant defendant's motion to dismiss plaintiff's Title VII and ADEA as barred by the statute of limitations. In addition, we decline to exercise supplemental jurisdiction over plaintiff's remaining state law claims. Thus, we remand this matter to the Court of Common Pleas of Northampton County, Pennsylvania.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SANDRA K. FRABLE,)

) Civil Action

Plaintiff	)	No. 05-CV-00402
	)	
vs.	)	
	)	
CHRISTMAS CITY HOTEL, LLC,	)	
trading as	)	
Radisson Hotel Bethlehem,	)	
	)	
Defendant	)	

O R D E R

NOW, this 28th day of September, 2005, upon consideration of Defendant's Motion to Dismiss Plaintiff's Complaint, which motion was filed February 4, 2005; upon consideration of Plaintiff's Memorandum of Law in Opposition to Defendant's Motion to Dismiss the Complaint, which response was filed March 4, 2005; upon consideration of the briefs of the parties;[8] and for the reasons articulated in the accompanying Opinion,

IT IS ORDERED that defendant's motion to dismiss is granted in part and denied in part.

IT IS FURTHER ORDERED that defendant's motion to

[8] Defendant's Reply Brief was filed March 16, 2005. Plaintiff's Memorandum of Law in Surreply to the Defendant's Reply Brief was filed June 28, 2005

dismiss plaintiff's claims under Title VII of the Civil Rights Act of 1991[9] and the Age Discrimination in Employment Act[10] is granted.

IT IS FURTHER ORDERED that Counts I and II of plaintiff's Complaint are dismissed.

IT IS FURTHER ORDERED that in all other respects defendant's motion to dismiss is denied without prejudice.[11]

IT IS FURTHER ORDERED that the Clerk of Court is directed to immediately remand this matter to the Court of Common Pleas of Northampton County, Pennsylvania.

IT IS FURTHER ORDERED that the Clerk of Court shall mark this matter closed for statistical purposes.

BY THE COURT:

/s/ James Knoll Gardner

James Knoll Gardner

United States District Judge

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[9] 42 U.S.C. §§ 2000(e) to 2000(e)-17.

[10] 29 U.S.C. §§ 621 to 634.

[11] It is the sense of this Order that defendant is free to raise any additional issues raised in its motion to dismiss and not decided herein before the Court of Common Pleas of Northampton County, Pennsylvania.